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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 381

KAL W. LINES,

Petitioner,

vs.

STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,

Respondent.

Brief for Respondent in Opposition to the Petition for a Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 384

KAL W. LINES,

Petitioner,

vs.

STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,

Respondent.

Brief for Respondent in Opposition to the Petition for a Writ of Certiorari

OPINIONS BELOW

The petitioner, KAL W. LINES, is correct in stating that the opinion of the Referee in Bankruptcy is unreported; that the opinion of the District Court reversing the order of the referee is reported in 147 F. Supp. 93; and that the opinion of the Court of Appeals in affirming the judgment of the District Court is reported in 242 F.2d 201. However, while the opinion of the Court of Appeals in denying the petition for rehearing is as yet unreported, respondent has been informed that the opinion will be reported. Respondent will inform this Court of the citation immediately upon publication of the advance sheets containing the opinion.

QUESTION PRESENTED

In this case, wage priority claims were paid by the trustee in bankruptcy during the bankruptcy proceeding for wages earned prior to bankruptcy for services rendered to the bankrupt prior to bankruptcy. In the California statute, in most state statutes, and in the federal act, liability for the employer's tax for unemployment insurance accrues only upon the payment of wages. The only issue in this case is whether the employer's tax which accrued upon the payment of those wages by the trustee should be paid as an expense of administration.

STATUTES INVOLVED

The statutory provisions involved in this case are reprinted as pertinent in the Appendix to this brief. Those provisions are:

1. California Unemployment Insurance Code sections 100, 101, 976, 984, and 986.
2. California Labor Code sections 222.5, 224, 226, 2928, and 3751.
3. California Code of Civil Procedure sections 1204, 1206, 1207, and 1208.
4. Bankruptcy Act sections 17(a), (1) and (5) [11 U.S.C. § 35(a), (1) and (5)]; 64a, (1), (2), and (4) [11 U.S.C. § 104(a), (1), (2), and (4)].

STATEMENT OF THE CASE

There has been no dispute on the facts of the present case. The assets in the estate of the bankrupt were sufficient to pay only the costs and expenses of administration and 52% of the claims for wages earned and services rendered prior to bankruptcy (R. 1-2, 16). There were not sufficient assets to make any payment to the tax priority claimants or

to the general creditors (R. 1-2, 16). The trustee paid all the costs and expenses of administration, except for the amounts in dispute here, namely the employer's contributions for unemployment insurance on the wage payments referred to above (R. 1-2, 16).

In paying the wage claimants, the trustee deducted the employee's contributions as required by the California Unemployment Insurance Code Sections 984 and 986, and transmitted them to the California Department of Employment (R. 2, 16). The trustee also deducted from the wage payments the Federal Withholding Taxes and transmitted them to the federal government (R. 2, 16). Upon not receiving the employer's contributions as a cost of administration, the California Department of Employment made demand upon the trustee for the unpaid employer's contributions (R. 2, 16).

This proceeding was then commenced by a petition of the trustee in bankruptcy for instructions concerning the demand of the Department of Employment of the State of California for payment of the employer's contributions as an expense of administration (R. 1-3). The referee in bankruptcy, after a hearing, by a written order instructed the trustee not to pay the demand of the California Department of Employment (R. 27). On Petition for Review filed by the California Department of Employment, the United States District Court in the Southern Division for the Northern District of California reversed and set aside the order of the referee and remanded the matter to the referee for further proceedings in accordance with the order of the District Court (R. 42). The District Court held that the bankruptcy trustee incurred liability for employer's contributions under the California Unemployment Insurance Code in paying the wage claims, and that this liability should be

paid as an expense of administration (R. 39). Although this matter involves only $28.38 the United States Court of Appeals for the Ninth Circuit, pursuant to Rule 33 of that court, granted leave to appeal under Section 24(a) of the Bankruptcy Act. The Court of Appeals affirmed the judgment of the District Court in all respects (R. 49). After oral argument on the petition by the trustee for rehearing, the Court of Appeals (R. 51, 52), denied the petition for rehearing (R. 58).

ARGUMENT

I. The Decision of the Court of Appeals for the Ninth Circuit Is Correct, and Moreover, the Decisions of the Courts of Appeal and the District Courts in the Other Circuits Establish the Same Rule as Has Been Applied by the Court of Appeals for the Ninth Circuit.

There are three well written opinions of the courts below which present the issues and their solutions in a clear-cut manner (R. 34-42, App. of Petition 25-33; R. 46-49, App. of Petition 34-39; R. 54-58, App. of Petition 41-47). These opinions in themselves answer all the contentions of the petitioner. Moreover, the rule for which petitioner argues would require this court to overturn numerous decisions of the federal courts in other circuits which have dealt with this problem. The decision of the Ninth Circuit in this case follows specifically *United States v. Fogarty* (8th Cir.), 164 F.2d 26 and *Pomper v. United States* (2nd Cir.), 196 F.2d 211.

It is well settled that the trustee in bankruptcy is an employer with respect to the payment of wage claims for performance of services for the bankrupt prior to the filing of the bankruptcy petition (*United States v. Fogarty* (8th Cir.), 164 F.2d 26; *United States v. Curtis* (6th Cir.), 178

F.2d 268; *Phinney v. Southern Warehouse Corp.* (5th Cir.), 212 F.2d 488; *United States v. Swedlow Engineering Co.* (D.C., Cal.), 100 F. Supp. 796; *In re Daigle* (D.C., Maine), 111 F. Supp. 109). It is equally settled that payments to wage claimants by the trustee are "wages paid" thus creating a liability for employee's contributions, and withholding tax (*United States v. Fogarty* (8th Cir.), 164 F.2d 26). The trustee in the present case paid the employees' contributions and federal withholding taxes even though no other tax creditors were paid. Thus the trustee has conceded he was the employer in the payment of the wage claims since it was only as an employer that he had a duty or was authorized to deduct, withhold, and pay the employees' contribution and the federal income taxes as anything other than the fourth priority. (See *United States v. Curtis* (6th Cir.), 178 F.2d 268.)

Under the California statute, employers become liable for employer's contributions not when the wages are earned, not when the wages should have been paid, but at the time when and if the wages are paid. (Unemp. Ins. Co. §§ 101, 976; *McHenry's Inc. v. Cal. Emp. etc. Com.*, 112 Cal. App. 2d 245, 247; 14 Ops. Cal. Atty. Gen. 274, 275). Respondents and amicus curiae* have made erroneous assertions that the tax is payable when wages are earned, rather than when wages are paid. The interpretation of the statute is, of course, a matter of state law. Under the California

*The respondent has agreed to stipulate to the filing of an amicus curiae brief by Mr. Charles Scully in support of the petitioner. Respondent has been served with that brief. This brief of the respondent in opposition to the petition for the granting of a writ of certiorari answers the contentions of both the petitioner and the amicus curiae. Therefore, it will be unnecessary for respondent to file a separate answer to the amicus curiae brief in the event this court grants leave to Mr. Scully to file such brief.

cases cited above it is clear that the tax accrues only when and if the wages are paid. Since the trustee paid the wages as the employer, he became liable for the employer's contribution.

The exact issue in this case was presented and solved in *United States v. Fogarty* (8th Cir.), 164 F.2d 26 and *Pomper v. U.S.*, (2nd Cir.), 196 F.2d 211. The court in the *Fogarty* case held at page 33 in an almost identical fact situation:

> "The taxes which we conclude are valid and enforcible against the estate of the bankrupt should be allowed and classified as an expense of administration having priority under section 64, sub. a, of the Bankruptcy Act. The taxes were not payable at the time the petition was filed by the bankrupt and only accrued 'as and when paid', that is, on the actual payment of 25% of the wage claims during the administration of the estate pursuant to the orders of the bankruptcy court."

The basis for this decision was the holding that the trustee was the employer since he had control of the payment of wages, succeeded to the custody and control of the assets, made payment of the wages out of the assets, and stood in the shoes of the bankrupt. The court in the *Fogarty* case, supra, further states at page 32:

> "The purpose is to treat the actual payer of the remuneration as the employer for withholding and payment purposes."

Without exception all the cases have decided the present type of problem by determining whether the wages are *paid* prior or subsequent to the filing of the petition in bankruptcy (*Pomper v. U.S.* (2nd Cir.), 196 F.2d 211; *In re Oceanic Ship Scaling Co.* (D.C. N.Y.), 100 F. Supp. 122; *In re John Horne Co.* (7th Cir.), 220 F.2d 33; *In re John Horne*

Co. (D.C. Ill.), 124 F. Supp. 317). When the taxable event is prior to bankruptcy, the claim is payable as a tax priority. When the taxable event is during bankruptcy, due to payment by the trustee, then the claim is payable as an expense of administration. If the wages are never paid then no tax is owing.

In the *Pomper* case, supra, at page 213, the court held that unemployment taxes levied on wages paid out before the bankruptcy petition was filed were not entitled to a priority as an administrative expense, but that taxes on wages paid out after the bankruptcy petition was filed were entitled to a priority as an expense of administration. In the *Pomper* case, supra, the employer's tax accrued on wages paid both prior and subsequent to the filing of a petition for a bankruptcy arrangement. The referee granted only a tax priority status for the employer's taxes on wages paid prior to bankruptcy, but he granted priority as a cost of administration to employer's taxes which accrued on wages paid after the petition was filed. The court approved the action of the referee at page 213.

See also *In re Oceanic Ship Scaling Co.* (D.C. N.Y.), 100 F. Supp. 122, for the written opinion of the *Pomper* case in the District Court.

Thus the *Fogarty* case, supra, and the *Pomper* case, supra, hold that unemployment taxes which accrue after bankruptcy on wages earned prior to bankruptcy are entitled to be paid as administrative expenses.

The *Fogarty* case, 164 F.2d 26, was followed in the United States District Court, Southern District of California, Central Division in the case of *U.S. v. Swedlow Engineering Co.* (D.C. Cal.), 100 F. Supp. 796. The District Court stated therein at page 797:

> "The Fogarty case is especially persuasive because the question before the court related to the liability of the trustee in bankruptcy for wages earned by the bankrupt's employees prior to the bankruptcy. The Court of Appeals held that the trustee was liable, because *he had control over the payment of wages past due*, and was 'the employer'."

The *Fogarty* case, supra, was also followed in *U. S. v. Curtis* (6th Cir.), 178 F.2d 268, although the exact issue presented in the present case was not reached or decided in the *Curtis* case.

A very significant consideration in this matter is the fact that if the unemployment contributions here involved are not paid as an expense of administration, then no portion will be paid in the bankruptcy proceeding at all. Such a result would not give proper protection to the collection of unemployment contributions, a tax which has great social implications and is generally favored by Congress, the State legislatures, and the courts. (See, *Gillum v. Johnson*, 7 Cal. 2d. 744.)

The employer's constributions here involved are not entitled to be paid in bankruptcy as a priority tax claim or even as a general creditor's claim since the employer's contributions were not owing at the time of the filing of the petition in bankruptcy and thus were not provable (*Ingels v. Boteler* (9th Cir.), 100 F.2d 915, affirmed 308 U.S. 57; *Colman Co. v. Withoft* (9th Cir.), 195 F. 250). In the *Ingels* case, supra, the Court of Appeals for the Ninth Circuit at page 918 stated:

> "Whether a debt or claim is provable in bankruptcy turns upon its status at the time of the filing of the petition * * *; claims not owing at the time of filing

of the petition are not provable * * * Colman Co. v. Withoft, 9 Cir., 195 F. 250, 252; Cantor v. Cherry, 73 F.2d 188."

* * * * * * *

"If the taxes in question were due and payable at the time of the filing of the petition, they would be provable, * * *."

In the *Colman* case, supra, the Court of Appeals for the Ninth Circuit at pages 251-2 stated:

"The date of filing the petition in bankruptcy is intended to mark the line of separation between debts that are provable and those that are not provable against the bankrupt's estate."

* * * * * * *

"* * * It is apparent that the appellant's claim was not a debt due and owing at the time when the petition was filed, but that it was contingent; that is to say all the facts necessary to be shown to establish the bankrupt's liability to the claimant had not occurred before the petition in bankruptcy was filed."

* * * * * * *

"At the time when the petition was filed, not only was the bankrupt not indebted to the appellant, but it could not then be known that he ever would be indebted to it, * * *."

There is no doubt that the employer's contributions were not owing at the time the petition in bankruptcy was filed in the present proceeding. If the wages had never been paid, the tax would never have become due and payable. It was entirely contingent. The Department of Employment could not have filed a proof of priority tax claim at any time since the debt was not provable.

II. Petitioner's Construction of Section 976 of the California Unemployment Insurance Code Is Erroneous.

Petitioner contends that Section 976 of the California Unemployment Insurance Code gives wage earners a priority of payment in bankruptcy. California Unemployment Insurance Code Section 976 establishes the employer's contribution as a tax upon the employer and prohibits a shifting of the incidence of that tax to the employees; but that section does not involve in any way a control over the employer as to the order of priority by which he must pay his debts or taxes.

California Unemployment Insurance Code Section 976 states:

> "Employer contributions to the Unemployment Fund shall accrue and become payable by every employer for each calendar year with respect to wages paid for employment. The contributions are due and shall be paid to the department for the Unemployment Fund by each employer in accordance with this division *and shall not be deducted in whole or in part from the wages of individuals in his employ.*" (Emphasis added.)

The petitioner contends that the underlined clause of Section 976 precludes payment of employer's contributions until the wage claims have been paid in full. Such a construction is incorrect. The only purpose of that clause is to ensure that there is no misunderstanding about the legal *and* economic incidence of the employer contribution. This clause makes it clear that the employer's contribution is a tax upon the employer which may not be shifted to the employee.

Conversely in Section 986 of the California Unemployment Insurance Code which provides for the employee's contribution, it is made clear that while the employer must

make the payment to the State, the employer is permitted to deduct from the employees wages for the employees' contribution.

Section 984 as pertinent states:

"* * * each worker shall contribute * * * 1 percent of * * * wages (paid to him by each employer with respect to employment) * * *.

Section 986 as pertinent states:

"Each employer shall, notwithstanding any provision of law in this state to the contrary, *withhold* in trust the amount of his workers' contributions from their wages at the time the wages are paid, shall show the *deduction* on his payroll records, shall furnish each worker with a statement in writing showing the amount which has been *deducted*, * * * and shall transmit all such contributions to the fund, in addition to his own contributions * * *" (Emphasis added.)

In precluding deduction of employer's contributions from wages, the statute provides that the employer may not reduce the amount of the debt he owes to the wage-earner, but it does not require the employer to pay wage claimants first before other creditors. The California sections providing the preference for wage claimants are to be found in California Code of Civil Procedure Sections 1204, 1206, 1207, and 1208. Those sections by their terms do not apply in bankruptcy. Moreover, the bankruptcy priority sections supersede any state preference sections (Bankruptcy Act Section 64a; *In re Penticoff* (D.C. Minn.), 36 F. Supp. 1).

In the California cases and statutes, deductions from wages are permitted or prohibited depending upon the nature of the deductions (Labor Code Sections 222.5, 224, 226, 2928, 3751; Unemp. Ins. Code Sections 976, 986; *Staf-*

ford v. L. A., etc., Retirement Bd., 42 Cal. 2d 795, 798-799; *Lyons v. Hoover*, 41 Cal. 2d 145, 148-149; *Healy v. Ind. Acc. Com.*, 41 Cal. 2d 118, 121-122; *La Societe Francaise v. Cal. Emp. Com.*, 56 Cal. App. 2d 534, 538, 551-552; *Conant v. City of Alameda*, 16 Cal. I.A.C. 31; *Kratzberg v. C. C. Moore Co.*, 17 Cal. Comp. Cases 190; 5 Ops. Cal. Atty. Gen. 289, 291-292). None of those cases or statutes gives even the slightest implication that preclusion of deduction requires priority of payment.

Labor Code Section 3751 is particularly interesting since in regard to Workmen's Compensation it is analogous to Unemployment Insurance Code Section 976. Section 3751 states:

> "No employer shall exact or receive from any employee any contribution, or make or take any *deduction* from the earnings of any employee either directly or indirectly, to cover the whole or any part of the cost of compensation under this division. Violation of this section is a misdemeanor."

Under the *Healy, Lyons, Stafford, Conant,* and *Kratzberg* cases, supra, which construed Section 3751 there certainly was no intimation that an employer may be prosecuted for a misdemeanor under that section if he pays the costs of workmen's compensation before he pays wages.

Moreover, even if Unemployment Insurance Code Section 976 were to be construed as a priority section, it would have been superseded by Section 64a of the Bankruptcy Act as has California Code of Civil Procedure Sections 1204, 1206-1208 (*City of New York v. Feiring*, 313 U.S. 283; *State of New Jersey v. Anderson*, 203 U.S. 483; see also *U.S. Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217; *Strom v. Peikes* (2nd Cir.), 123 F.2d 1003, 1006).

It should be noted that wage claims like taxes also are not dischargeable in bankruptcy (Bankruptcy Act Section 17a (5)), and thus the wage claim still continues as a debt of the bankrupt even after the bankruptcy proceedings have been concluded.

III. The Purposes of the Unemployment Insurance Act Are for the Benefit of the Wage-earner.

The purpose of the Unemployment Insurance Act is set out in great detail in the California Code. (Unemp. Ins. Code Sections 100 and 101). Simply, it is to provide "benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (Unemp. Ins. Code Section 100; see, also *Hill v. Brisbane*, 66 Cal. App. 2d 15, 18; 24 Cal. L. Rev. 288, 291) As discussed above, employer's contributions in this case are payable as expenses of administration. Congress has seen fit to give expenses of administration priority over wage claims. (Bankruptcy Act, Section 64a). Thus not only employer's constributions, but also all other expenses of administration necessarily leave less to be paid to wage claimants. The propriety of the order of payment is a matter for the Congress.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

Dated: San Francisco, California
September 13, 1957.

Respectfully submitted,

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(Appendix Follows)



Appendix

STATUTES INVOLVED

California Unemployment Insurance Code.

§ 100. As a guide to the interpretation and application of this division the public policy of this State is declared as follows:

Experience has shown that large numbers of the population of California do not enjoy permanent employment by reason of which their purchasing power is unstable. This is detrimental to the interests of the people of California as a whole.

The benefit to all persons resulting from public and private enterprise is realized in the final consumption of goods and services. It is contrary to public policy to permit the supply of consumption goods and services at prices which do not provide against that harm to the population consequent upon periods of unemployment of those who contribute to the production and distribution of such goods and services.

Experience has shown that private charity and local relief cannot alone prevent the effects of unemployment. Experience has shown that if the State awaits the coming of excessive unemployment it can neither create immediately the organization necessary to orderly, economical and effective relief nor bear the financial burden of relief without disrupting its whole system of ordinary revenues and without jeopardizing its credit.

The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed

through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.

It is the intent of the Legislature that unemployed persons claiming unemployment insurance benefits shall be required to make all reasonable effort to secure employment on their own behalf.

§ 101. This part is a part of a national plan of unemployment reserves and social security, and is enacted for the purpose of assisting in the stabilization of employment conditions. The imposition of the tax herein imposed upon California industry alone, without a corresponding tax being imposed upon all industry in the United States, would, by the corresponding penalty upon California industry, defeat the very purposes of this law as set forth in this article. Therefore when existing federal legislation which provides for a tax upon the payment of wages by employers in this State, against which all or any part of the employer contributions required under this part may be credited is repealed, amended, interpreted, affected or otherwise changed in such manner that no portion of such contributions may be thus credited, then upon the date of such change, the provisions of this part requiring employer contributions and providing for payment of unemployment compensation benefits shall cease to be operative and any assets in the Unemployment Fund or Unemployment Administration Fund shall in the discretion of the State Treasurer be held in the then existing depositaries or otherwise in the State Treasury. In the case of the Unemployment Administration Fund, such money may thereafter be dealt with by the State Treasurer pursuant to the conditions of the grant thereof to the State by the United States Government or agency thereof.

§ 976. Employer contributions to the Unemployment Fund shall accrue and become payable by every employer for each calendar year with respect to wages paid for employment. The contributions are due and shall be paid to the department for the Unemployment Fund by each employer in accordance with this division and shall not be deducted in whole or in part from the wages of individuals in his employ.

§ 984. Beginning on January 1, 1936, each worker shall contribute one-half of 1 percent of the wages paid to him by each employer with respect to employment; and beginning on January 1, 1937, nine-tenths of 1 percent of such wages and on and after January 1, 1938, after his employer has satisfied the conditions set forth in this part with respect to becoming an employer, 1 percent of such wages; except that the rate of contributions required of a worker shall not in any year exceed 50 percent of the general rate required of employers.

§ 986. Each employer shall, notwithstanding any provisions of law in this State to the contrary, withhold in trust the amount of his workers' contributions from their wages at the time the wages are paid, shall show the deduction on his pay roll records, shall furnish each worker with a statement in writing showing the amount which has been deducted, in such form and at such times as may be prescribed, and shall transmit all such contributions to the fund, in addition to his own contributions, pursuant to authorized regulations.

California Labor Code.

§ 2225. No person shall withhold or deduct from the compensation of any employee, or require any prospective employee or applicant for employment to pay, any fee for,

or cost of, any pre-employment medical or physical examination taken as a condition of employment.

§ 224. The provisions of Sections 221, 222 and 223 shall in no way make it unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by State or Federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute.

§ 226. Every employer shall semimonthly or at the time of each payment of wages furnish each of his employees either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing all deductions made from such wages; provided, all deductions made on written orders of the employee may be aggregated and shown as one item.

§ 2928. No deduction from the wages of an employee on account of his coming late to work shall be made in excess of the proportionate wage which would have been earned during the time actually lost, but for a loss of time less than thirty minutes, a half hour's wage may be deducted.

§ 3751. No employer shall exact or receive from any employee any contribution, or make or take any deduction from the earnings of any employee either directly or indirectly, to cover the whole or any part of the cost of compensation under this division. Violation of this section is a misdemeanor.

California Code of Civil Procedure.

§ 1204. When any assignment, whether voluntary or involuntary, and whether formal or informal, is made for the

benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee for the benefit of creditors, the wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services rendered such assignor, person, firm, association or corporation, within 90 days prior to such assignment, or the taking over of such property, or to the commencement of the proceeding when a court action is involved, and not exceeding six hundred dollars ($600) each, constitute preferred claims and liens as between creditors of the debtor, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay some becomes available. If there is insufficient money with which to pay all such labor claims in full the money available must be distributed among the claimants in proportion to the amount of their respective claims. The trustee, receiver or assignee for the benefit of creditors shall have the right to require sworn claims to be presented and shall have the right to refuse to pay any such preferred claim, either in whole or in part, if he has reasonable cause to believe that such claim is not valid but must pay any part thereof that is not disputed, without prejudice to the claimant's rights, as to the balance of his claim, and withhold sufficient money to cover the disputed portion until the claimant in question has a reasonable opportunity to establish the validity of his claim by court action, either in his own name or through an assignee.

This section is binding upon all the courts of this State and in all receivership actions the court must order the

receiver to pay promptly out of the first receipts and earnings of the receivership, after paying the current operating expenses, such preferred labor claims and such liens.

§ 1206. Upon the levy of any attachment, garnishment, or execution, not founded upon a claim for labor, any miner, mechanic, salesman, servant, clerk, laborer or other person who has performed work or rendered personal services for the defendant within 90 days prior to the levy, may file a verified statement of his claim therefor with the officer executing the writ, file a copy thereof with the court which issued the writ, and give copies thereof, containing his address, to the plaintiff and the defendant, or any attorney, clerk or agent representing them, or mail copies to them by registered mail at their last known address, return of which by the post office undelivered shall be deemed a sufficient service if no better address is available, and such claim, not exceeding six hundred dollars ($600), unless disputed, must be paid by such officer, immediately upon the expiration of the time for dispute of the claim as prescribed in Section 1207, from the proceeds of such levy remaining in his hands at the time of the filing of such statement or collectible by him on the basis of the writ.

The court issuing the writ must make a notation on its docket of every preferred labor claim of which it receives a copy and must endorse on any execution or abstract of judgment issued subsequently in the case that it is issued subject to the rights of a preferred labor claimant or claimants thereunder and giving the names and amounts of all such preferred labor claims of which it has notice. In levying any execution the officer making the levy shall include in the amount due under the execution any and all preferred labor claims that have been filed in the action and of which he has notice, except any claims which may have been finally disallowed by the court under the procedure provided for

herein and of which disallowance he has actual notice. The amount due on preferred labor claims that have not been finally disallowed by the court shall be considered a part of the sum due under any attachment, garnishment or execution in augmentation of the amount thereof and it shall be the duty of any person, firm, association or corporation on whom a writ of attachment, garnishment or execution is levied to immediately pay to the levying officer the amount of such preferred labor claims, out of any money belonging to the defendant in the action, before paying the principal sum called for in the writ.

If any claim is disputed within the time, and in the manner prescribed in Section 1207, and a copy of the dispute is mailed by registered mail to the claimant or his attorney at the address given in his statement of claim and the registry receipt is attached to the original of the dispute when it is filed with the levying officer, or is handed to the claimant or his attorney, the claimant, or his assignee, must within 10 days after such copy is deposited in the mail or is handed to the claimant or his attorney petition the court having jurisdiction of the action on which the writ is based, for a hearing before it to determine his claim for priority, or the claim to priority is barred. If more than one attachment, garnishment or execution is involved the petition shall be filed in the court having jurisdiction over the senior attachment, garnishment or execution. The hearing shall be held within 20 days from the filing of the petition unless the court continues it for good cause. Ten days' notice of the hearing shall be given by the petitioner to the plaintiff and the defendant, and to all parties claiming an interest in the property, or their attorneys. The notice may be informal and need specify merely the name of the court, names of the principal parties to the senior attachment, garnishment

or execution and name of the wage claimant or claimants on whose behalf it is filed but shall specify that the hearing is for the purpose of determining the claim for priority. The plaintiff or the defendant, or any other party claiming an interest may contest the amount or validity of the claim in spite of any confession of judgment or failure to appear or to contest the claim on the part of any other person.

There shall be no cost for filing or hearing the petition and the hearing on same shall be informal but all parties testifying must be sworn. Any claimant may appear on his own behalf at the hearing and may call and examine witnesses to substantiate his claim. An appeal may be taken from a judgment in a proceeding under this section in the manner provided for appeals from judgments of the court where the proceeding is had.

The officer must retain in his possession until the determination of the claim for priority so much of the proceeds of the writs as may be necessary to satisfy the claim, and if the claim for priority is allowed, the officer must pay the amount due, including the claimant's cost of suit, from such proceeds, immediately after the order allowing the claim becomes final. (Am. Stats. 1951, ch. 476, § 2.)

§ 1207. Within five days after receiving a copy of the statement provided for in the next preceding section, either the plaintiff or the defendant in the action in which the writ issued may file with the officer a sworn statement denying that any part of such claim is due for services rendered within ninety days next preceding the levy of the writ, or denying that any part of such claim, beyond a sum specified, is so due. Such sworn statement cannot be made on information and belief unless the party swearing to same has actual information and belief that the wage claim, or the portion thereof that is contested, is not justly due, and in

such case the nature and source of the information must be given. If a part of the claim is admitted to be due, and the claimant nevertheless files a petition for hearing and the court does not allow more than the amount so admitted, he cannot recover costs but the costs must be adjudged against him, and the amount thereof deducted from the sum found due him.

§ 1208. If the claims presented under section 1206 and not disputed, or, if disputed, established by judgment, exceed the proceeds of the writ not disposed of before their presentation, such proceeds must be distributed among the claimants in proportion to the amount of their respective claims; provided, however, that the costs incurred by the senior attaching plaintiff or judgment creditor in such action must first be taken care of.

If sufficient money to pay in full all preferred labor claims filed under an attachment, garnishment or execution does not become available immediately upon the expiration of the time for dispute of such claims under section 1207, any of the said claimants, or their assignees, shall have the right to proceed directly against the money or other property levied on in individual or joint actions by themselves or their assignees against the defendant, and the attachment, garnishment or execution under which the preferred claims were filed shall be considered set aside as far as such claimants, or their assignees, are concerned so as to enable them, or any of them, or any of their assignees, to proceed directly against any or all of the money or other property in question by means of their own attachments, garnishments or executions; provided, however, that any money collected on behalf of any such labor claimant, or his assignee, on the basis of such new attachment, garnishment or execution, shall be shared in by the other preferred labor claimants

who have filed claims that have not been disputed, or, if disputed, established by judgment, in proportion to the amount of their respective claims, deducting only the costs in the action brought by the said labor claimant, or his assignee, and the costs in the original action brought by the senior attaching plaintiff or judgment creditor.

If such senior attaching plaintiff or judgment creditor requests a release of his original attachment, garnishment or execution, and the preferred labor claims filed under same are not released, the officer who levied the writ must first mail notices of such request to release to each of the labor claimants who have filed claims, or their attorneys, which notices must specify that unless the said claimants bring attachment actions of their own and levy on the money or property in question within five days from the date thereof the said money or property will be released from the attachment, garnishment or execution; provided, however, that such officer may instead collect sufficient money on the basis of the original writ to pay off the preferred labor claims in full and then release the said attachment, garnishment or execution, but in no case shall he release same without first taking care of the labor claims until the said five day period has expired, unless his costs, keepers' fees or storage charges have not been immediately taken care of by some of the parties involved. In any case it shall be lawful for a garnishee to pay over to the officer levying the writ any money held by him without waiting for execution to be levied and the said officer's receipt for the money shall be a sufficient quittance, and the said officer must collect such money and immediately pay off the established preferred labor claims in all cases where it is possible to do so without additional court proceedings on his part.

Bankruptcy Act.

§ 17(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as

(1) Are due as a tax levied by the United States, or any State, county, district, or municipality; * * *

(5) Are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or * * * (11 U.S.C. § 35(a), (1) and (5))

§ 64a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be

(1) The actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of title 18 of the United States Code, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United

States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow: *Provided, however,* That where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any;

(2) Wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract; * * *

(4) Taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and * * * (11 U.S.C. § 104(a)(1), (2) and (4).)